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VIA ECFS

Marlene H. Dortch, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: ***Notice of Ex Parte*, Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992, MB Docket No. 05-311**

Dear Ms. Dortch:

On July 25, 2019, Rick Chessen of NCTA – The Internet & Television Association spoke by phone with Michelle Carey of the Media Bureau regarding the above-referenced proceeding.[1] During that conversation, I noted that NCTA took issue with the multiple filings dated July 24, 2019 by various entities and organizations affiliated with state and local interests ("Franchising Authorities' Filings"), most of which were not publicly available until July 25,[2] as set forth more fully below.

LFA Ex Parte. The eleventh-hour, scattershot arguments raised in the July 24, 2019 filing by Anne Arundel County et al. ("LFAs") simply disagree with the statutory clarifications and policy choices made by the Commission in ensuring compliance with the Cable Act in today's highly competitive marketplace. For the most part, these arguments are already fully

[1] *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd. 8952 (2018) ("*Second FNPRM*"); *see also Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Draft Third Report and Order, FCC-CIRC1908-08 (rel. Jul. 11, 2019) ("*Draft Order*").

[2] *See* Letter from Nancy Werner, General Counsel, National Association of Telecommunications Officers and Advisors, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (July 24, 2019) ("NATOA Meetings Ex Parte"); Letter from Nancy Werner, General Counsel, National Association of Telecommunications Officers and Advisors, et al., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (July 24, 2019) ("NATOA Ex Parte"); Letter from Tillman L. Lay, Counsel for City of Eugene, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (July 24, 2019) ("City of Eugene Ex Parte"); Letter from Joseph Van Eaton et al., Best Best & Krieger, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (July 24, 2019) ("LFA Ex Parte").

addressed in the record.[3] To the extent the filing raises any new arguments, they are easily dismissed.

For example, the LFAs wrongly assert that the *Draft Order*'s reference to cable build out obligations as "an essential part of the provision of cable service to subscribers" has no basis in the Cable Act and merely reflects the Commission's view of which franchise requirements are important and which are not.[4] In fact, the distinction drawn by the *Draft Order* is entirely consistent with the relevant Cable Act provisions and Commission and judicial precedent. While neither Section 621(a)(3) nor Section 621(a)(4)(A) impose an affirmative federal build-out or universal service obligation on cable operators,[5] the inclusion of these provisions under the rubric of "general franchise requirements" makes clear that the construction of the cable system is essential to providing cable service and a core element of the cable franchising process. That, of course, stands to reason since without the construction of a cable system there can be no provision of cable service.

Pursuant to these provisions, franchising authorities (and, in some instances, local or state cable laws) typically establish build out requirements (1) based on the demand for cable service from a sufficient number of unserved households (or "household density") to justify the build out costs or (2) if the requisite household density is lacking, where the requesting customer is willing to contribute to such costs.[6] These requirements allow for expansion of a cable system without regard to the income of potential subscribers and "over a reasonable period of time," as contemplated by the Cable Act. They also serve the public interest by making cable and non-cable services provided by the cable system available to more consumers. Within these

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[3] *See generally* LFA Ex Parte.

[4] LFA Ex Parte at 2-3. The State of Hawaii made similar arguments in its recent ex parte. *See* Letter from Bruce Olcott, Counsel to the State of Hawaii, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 1-4 (July 22, 2019) ("Hawaii Ex Parte").

[5] *Americable Int'l, Inc. v. Dep't of Navy,* 129 F.3d 1271, 1274-75 (D.C. Cir. 1997), as amended (Jan. 30, 1998)); *ACLU v. FCC*, 823 F.2d 1554, 1580 (D.C. Cir. 1987) (holding that 47 U.S.C. § 541(a)(3) "on its face prohibits discrimination on the basis of income; it manifestly does not require universal service"); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763, 781-82 (6th Cir. 2008) (observing that Congress rejected a version of the statute that would have required cable operators to provide "universal service throughout the entire franchise area . . . which would have situated all buildout requirements as presumptively reasonable"); *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 ¶ 85 (2007) ("*First 621 Order*").

[6] *See, e.g.*, 30 V.S.A. § 517 (the franchising authority "may require the construction of cable television line extensions when a company receives a bona fide request for service from a reasonable number of verified customers or with reasonable contributions in aid of construction from customers"); Cal. Pub. Util. Code § 5890 (staying build out obligations if the cable operator does not achieve at least a 30-percent subscription rate from the homes passed); Michigan Uniform Video Services Local Franchise Act § 484.3309 ("A video service provider is not required to meet the 50% [coverage] requirement in this subsection until 2 years after at least 30% of the households with access to the provider's video service subscribe to the service for 6 consecutive months.").

parameters, the cable operator has a reasonable prospect of recovering its build out costs and generating revenues from the new customers to help support its cable operations.

In contrast, PEG channels and I-Nets are supplementary uses of the cable system. Many cable franchises have no PEG channel or I-Net requirements, yet typically have some kind of construction or build-out obligation since having a cable system is essential to the provision of cable service. Moreover, PEG-related costs, as well as the costs of I-Nets and I-Net services that are not reimbursed by governmental users, are incurred by the cable operator and its customers without any opportunity to recoup those costs from the franchising authority or the users of these facilities. As the record in this proceeding demonstrates, such costs are not essential to the provision of cable services.[7] Nor do they support the local cable operations or the expansion of cable and non-cable services provided by the cable system to more consumers.[8] It is therefore appropriate for the Commission to treat these costs as in-kind contributions subject to the statutory franchise fee cap, except where the Cable Act expressly provides otherwise in the case of PEG capital costs. The LFAs' attempt to conflate cable build out obligations with these regulatory obligations mischaracterizes the relevant Cable Act provisions and ignores how cable services have been provided and expanded over time in franchise areas, consistent with the reasonable limiting principles established by Congress.

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[7] *See, e.g.*, Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 51 (Nov. 14, 2018) ("NCTA Comments") (arguing that buildout requirements are "part of the provision of cable service in the franchise area" and therefore not subject to the statutory five-percent cap); *id*. at 64 (distinguishing requirements to build out *broadband* infrastructure, which are not part of the provision of cable service); Reply Comments of NCTA – The Internet & Television Association, MB Docket No. 05-311, at 16 (Dec. 14, 2018) (arguing that buildout requirements "are not franchise fees because they are an essential part of providing service to the community"); *id*. at 17 (arguing that LFAs focusing on whether certain obligations "benefit the community" miss the point, and that the key distinction is that buildout obligations "are a basic requirement for service in a franchise area – you cannot serve households to which you have not built out," whereas "PEG obligations, I-Nets, and other in-kind exactions serve no similar essential function for the provision of cable service to subscribers, but rather provide value to franchising authorities or particular third parties for purposes determined to be in the public interest by the franchising authority"); *see also* Letter from Rick Chessen, NCTA, to Marlene H. Dortch., Secretary, FCC, MB Docket No. 05-311, at 3-4 (Apr. 18, 2019) (stating that obligations authorized under Section 624 are not franchise fees under Section 622(g), because they "are part of the provision of cable services, just like reasonable cable line extension requirements").

[8] *See, e.g.*, Letter from the Multicultural Media, Telecom and Internet Council et al., to Chairman Ajit Pai and Commissioners Michael O'Rielly, Brendan Carr, Jessica Rosenworcel, and Geoffrey Starks, MB Docket No. 05-311, at 1-2 (Apr. 25, 2019); Letter from Geoffrey A. Manne, International Center for Law and Economics, et al., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 18-20 (July 18, 2019); Letter from Katie McAuliffe, Americans for Tax Reform, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, Attachment (Phoenix Center Bulletin) (May 8, 2019); Letter from Thomas A. Schatz, Citizens Against Government Waste, to Chairman Ajit Pai and Commissioners Michael O'Rielly, Brendan Carr, and Jessica Rosenworcel, MB Docket No. 05-311, at 2 (Sept. 13, 2018); NCTA Reply Comments, Attachment 2 (Report of Jonathan Orszag and Allan Shampine), at 16-19 (Dec. 14, 2018); *see also* Letter from Steve Morris, NCTA, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 17-83, Attachment (Economic Impact Report) (July 22, 2019).

Equally baseless, the LFAs assert that there was inadequate notice on the "essential to cable" analysis for build out requirements. The *Second FNPRM* expressly proposes to treat build-out obligations as outside the statutory five-percent cap because they "are part of the provision of cable service in the franchise area and the facilities ultimately may result in profit to the cable operator."[9] The *Second FNPRM* also specifically requested comment on whether "the costs of build-out requirements" should be excluded from the definition of "cable-related, in-kind contributions."[10] NCTA filed extensive comments and ex partes addressing these items,[11] as did the State of Hawaii.[12] For further transparency, the *Draft Order* acknowledges that the "essential to cable" analysis modifies "slightly" the definition proposed in the *Second FNPRM*,[13] which is well within the Commission's prerogative.[14]

The filing also wrongly asserts that the *Draft Order* assumes without basis that certain state laws or franchise requirements that it preempts would be severable, such that entire state franchising regimes and entire franchises would not be invalidated in their entirety.[15] In fact, this is not an assumption in the *Draft Order*, but rather the mandate enacted by Congress in Section 636(c), which expressly preempts "any *provision*" of a state or local law or "any *provision* of any franchise" that is inconsistent with the Cable Act.[16] In such cases, the inconsistent provision "shall be deemed to be preempted and superseded."[17] To the extent other provisions of a state or local law, or a franchise, are not inconsistent with the Cable Act, they are unaffected.

The LFAs are likewise mistaken in suggesting that the *Draft Order* contradicts itself with respect to which equipment can be viewed as part of the cable system.[18] They note that the Commission finds, by reference to the definition of "cable system" in Section 602(7), that facilities used by cable operators who are also common carriers to provide telecommunications *services* (and other non-cable *services*) are exempt from regulation by LFAs.[19] They also note that the *Draft Order*'s subsequent discussion of how a cable franchise must be construed under Section 621(a)(2) includes the determination that a franchise authorizes the construction and

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[9] *Second FNPRM* ¶ 21.

[10] *Id.* ¶ 24.

[11] *See supra* note 7.

[12] Hawaii Ex Parte at 1-4.

[13] *Draft Order* ¶ 25 n.115.

[14] *See City of Stoughton v. EPA*, 858 F.2d 737, 751 (D.C. Cir. 1988) (holding that "an agency may make changes in its proposed rule on the basis of comments" that are "a 'logical outgrowth' of the proposal and previous comments") (cataloging cases).

[15] LFA Ex Parte at 2.

[16] 47 U.S.C. § 556(c) (emphasis added).

[17] *Id.*

[18] LFA Ex Parte at 5.

[19] *See Draft Order* ¶¶ 68-73.

operation of the cable system in the rights-of-way for both cable and non-cable services.[20] But the notion that these two determinations are inconsistent with each other wrongly conflates two distinct issues. As the Commission explains in the *Draft Order*, the carve-out for telecommunications services in the cable system definition was intended to preserve the authority of state governments to ensure that telecommunications services provided via cable systems could not avoid universal service and other Title II obligations.[21] Congress thus sought to preserve the *status quo* for telecommunications services by keeping cable regulation under Title VI separate from telecommunications regulation under Title II. When it comes to the separate issue of what rights a cable franchise "shall be construed" to convey under Section 621(a)(2),[22] the *Draft Order* correctly holds that Congress intended for such rights to include the construction and operation of a cable system in rights-of-way within the franchise area for both cable and non-cable services.[23]

The LFAs next suggest that the *Draft Order* would "prevent states and localities from exercising *any* authority to regulate non-cable services," contrary to the savings provision in Section 621(d)(2).[24] This too mischaracterizes the *Draft Order*, "which still leaves meaningful room" for states and localities to exercise their traditional police powers.[25] Moreover, the notion that Section 621(d)(2) – which was enacted as part of the 1984 Cable Act – would somehow confer on states and localities the unfettered right to regulate non-cable services delivered over franchised cable systems cannot be squared with the statutory scheme and congressional intent. While the term "communications service" used in Section 621(d)(2) is not defined in the Communications Act or Commission orders, read in context with subsection (d)(1)— which expressly preserves state authority to require the filing of informational tariffs for certain intrastate communications service provided by a cable system—it is apparent that Congress was referring to the regulation of purely intrastate telecommunication *services* in subsection (d)(2).[26] Moreover, other provisions of the Communications Act, including provisions added subsequent to the 1984 Cable Act, make clear that Congress intended to prohibit duplicative authorizations

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[20] *See id.* ¶¶ 85-90.

[21] *Id.* ¶ 73 (citing legislative history).

[22] 47 U.S.C. § 541(a)(2).

[23] *Draft Order* ¶¶ 87-90 (citing legislative history).

[24] LFA Ex Parte at 5 (emphasis in original); *see also* 47 U.S.C. § 541(d)(2) ("Nothing in this subchapter shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any *communication service* other than cable service, whether offered on a common carrier or private contract basis." (emphasis added)).

[25] *Draft Order* ¶ 107 (delineating a number of categories of state and local rules that are not preempted).

[26] 47 U.S.C. § 541(d)(1). *See also City of Chicago v. Comcast Cable Holdings, LLC*, 900 N.E.2d 256, 263-64 (Ill. 2008). The Draft Order gives effect to this reasonable reading of the statutory framework by expressly preserving state regulation of certain purely intrastate telecommunications services. *Draft Order* ¶ 107; *see also id.* ¶ 73.

and fees on the *access to public rights-of-way* to construct and operate cable systems to provide non-cable services.[27]

The LFAs also fault the *Draft Order* for relying on the Section 621 "adequate" standard in the franchise renewal context, claiming that this approach conflicts with an element of Section 626 regarding whether a renewal proposal is reasonable to meet the needs and interests of the community.[28] This is another conflation of statutory requirements. While Section 626 looks to reasonable community needs and interests for purposes of renewal, nothing in that provision alters the limits that Congress established in Section 621 for "*General* Franchise Requirements" or permits franchising authorities to exceed those limits. Requests for PEG channel capacity in a renewal proceeding remain subject to the adequacy standard in Section 621.[29] Likewise, Section 626 does not affect the statutory five-percent cap on franchise fees in Section 622, which applies to "any" franchise.[30] A franchising authority may not evade the statutory cap on the theory that the funding of community needs and interests by a cable operator and its subscribers requires more than the amount Congress authorized, whether through monetary payments, in-kind contributions, or any other "tax, fee, or assessment of any kind."[31]

Nor is there a problem with the *Draft Order*'s clarification that entities that provide only telecommunications and information services could be subject to "a state utility tax for use of the rights-of-way," whereas a franchised cable operator providing the same services could not be, since it already pays franchise fees.[32] The LFAs wrongly assert (without explanation) that this result is somehow "inconsistent" with the *2018 Small Cell Order*, which requires that fees to use the rights-of-way to deploy small cells for the provision of telecommunications must be cost-based and no greater than those charged to "similarly situated" entities for comparable uses of

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[27] *See Draft Order* ¶¶ 82-110; *see also* NCTA Comments at 11-21; NCTA Reply Comments at 24-29. The LFAs also suggest that the *Draft Order* is contrary to the Commission's statement in its *Second Report and Order* that franchise fees do "not apply to non-cable franchise fee requirements, such as any lawful fees related to the provision of telecommunications services." *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 22 FCC Rcd. 19633 ¶ 11 n.31 (2007); *see* LFA Ex Parte at 10 n.29. The LFAs nowhere explain how exactly this statement is in conflict with the *Draft Order*, and, in any event, the Commission is authorized to clarify the scope of its preemption of conflicting state and local regulations, just as it has done in the *Draft Order*.

[28] LFA Ex Parte at 8.

[29] *See* 47 U.S.C. § 531(a)(4)(B). Requests for PEG channel capacity as part of a renewal proposal are also subsection to Section 626, but that does not supersede the separate limitations in Section 621. *Id.* § 531(b). Section 611(d) further directs that franchising authorities must return PEG channel capacity that "is not being used for the purposes designated." *Id.* § 531(d).

[30] *Id.* § 542(a)-(b).

[31] *Id*. § 542((g)(1).

[32] LFA Ex Parte at 10 n.29; *see also* NCTA Comments at 26 n.80 ("Once [a telecommunications carrier] provides cable service, the telco would become obligated to pay cable franchise fees for access to the rights-of-way for its 'cable system' under Section 622, rather than Section 253.").

the rights-of-way.[33] Nothing in the *Draft Order* requires that fees for small cell deployment exceed costs or be higher than fees charged to others for rights-of-way access. Rather, the *Draft Order* recognizes that cable operators pay for access to public rights-of-way, like other providers of communications services, albeit under a different framework from telecommunications providers. While cable operators might prefer to be on the same footing as other providers that pay cost-based rather than revenue-based fees for such access, that is for Congress to decide. The *Draft Order* simply recognizes that these are parallel schemes and clarifies the steps that LFAs and cable operators must take to comply with the existing applicable law.

Finally, the Commission should reject suggestions from the LFAs (and others) to delay the effective date of the final order or to make its requirements "permissive" or allow "settlements" or other agreements outside of a franchise that do not comport with the *Draft Order*.[34] As fully addressed in the record, localities have no constitutional property right in franchise fee revenues that exceed the statutory five-percent cap established by Congress, and any claimed state or local right to additional fees would be preempted by federal law.[35] In other words, compliance with the Cable Act cannot be waived, even temporarily. As the *Draft Order* explains, existing franchising practice was not "lawful merely because it was longstanding: the Commission's duty is to conform its rules to law, not tradition."[36]

NATOA and Eugene Ex Partes. NATOA and several other organizations, and the City of Eugene, Oregon, likewise take issue with several aspects of the *Draft Order*.[37] Neither commenter demonstrates, or even attempts to demonstrate, that their preferred interpretations of the statute are unambiguously required or that the Commission's contrary interpretations are unambiguously foreclosed or unreasonable. Thus, even if these commenters' preferred interpretations had merit—which they do not—the Commission could still reject them in favor of other, reasonable constructions of the Cable Act.[38]

For example, NATOA claims that the *Draft Order* "allows cable operators to rewrite agreements that they voluntarily entered into."[39] In fact, the *Draft Order* simply clarifies the metes and bounds of state and local authority over cable operators and cable systems. As NCTA

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[33] *See Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, Declaratory Ruling and Third Report and Order, 33 FCC Rcd. 9088 ¶ 50 (2018) ("*2018 Small Cell Order*"); *id.* ¶ 70 (holding that "gross revenue fees generally are not based on the costs associated with an entity's use of the [rights-of-way], and where that is the case, are preempted under Section 253(a)").

[34] *See* NCTA Comments at 55-59.

[35] *See, e.g.*, NCTA Reply Comments at 22-23, 34-35 & n.115; Letter from Rick Chessen, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311, at 1-2, n.5, 3-4 (Mar. 13, 2019) ("NCTA March 13 Ex Parte").

[36] *Draft Order* ¶ 53.

[37] *See* NATOA Ex Parte; City of Eugene Ex Parte.

[38] *See, e.g.*, *Sorenson Commc'ns, LLC v. FCC*, 897 F.3d 214, 223-24 (D.C. Cir. 2018); *Chevron, USA, Inc. v. NRDC*, 467 U.S. 837 (1984).

[39] NATOA Ex Parte at 1.

has explained, in-kind contributions are not voluntary for cable operators.[40] The fact that the *Draft Order* preempts certain provisions in existing agreements merely brings those agreements into conformance with the law.[41] NATOA also faults the *Draft Order* for a purported "lack of analysis" to support its conclusions that "in-kind contributions" are "exactions,"[42] but admits that the *Draft Order* does, in fact, consider this question.[43] NATOA now tries to draw a distinction between "fees" and "exactions" in negotiated transactions, but its argument lacks any basis in the statute, any proffered definitions of its terms, or common sense.[44]

NATOA also raises objections to the distinction drawn by the *Draft Order* between in-kind contributions and obligations that are essential to the provision of cable service. As explained above, this distinction is entirely consistent with the statute and precedent. NATOA mischaracterizes the *Draft Order* in contending that it "provides no analysis of why franchise obligations that are essential" are not "taxes, fees, or assessments of any kind."[45] The *Draft Order*'s analysis on this point is clear: Essential "obligations are not a 'tax, fee, or assessment'" because "they are simply part of the provision of cable service under a franchise."[46] That interpretation comports not only with NATOA's view,[47] but also with the views of "[b]oth cable industry and LFA commenters [who] generally support the contention that build-out obligations should not count toward the five percent franchise fee cap."[48] Moreover, contrary to NATOA's view,[49] the *Draft Order* also explains why excluding "essential" obligations is consistent with how Congress treated "PEG access and other franchise obligations designed to meet community needs."[50]

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[40] *See* NCTA March 13 Ex Parte at 1-3.

[41] *Draft Order* ¶ 53.

[42] NATOA Ex Parte at 2.

[43] *Id.*; *see also Draft Order* ¶ 12 & n.54.

[44] *Second FNPRM* ¶ 24 (proposing to define "cable-related, in-kind contributions" to include "any non-monetary contributions related to the provision of cable services provided by cable operators *as a condition or requirement of a local franchise agreement*") (emphasis added). NATOA rehashes its argument that deals resulting from arms-length negotiations cannot be franchise fees—even though, as NCTA has pointed out, this would exclude franchise fees themselves. NCTA Reply at 5, n.13.

[45] NATOA Ex Parte at 5.

[46] *Draft Order* ¶ 57.

[47] NATOA Ex Parte at 6 (NATOA "agree[s] with the *Draft Order*'s conclusion that build-out and customer service obligations are not 'franchise fees'").

[48] *Draft Order* ¶ 57 & n.227 ("Both cable industry and LFA commenters generally support the contention that build-out obligations should not count toward the five percent franchise fee cap.").

[49] NATOA Ex Parte at 6.

[50] *Draft Order* ¶ 57 & nn.225-227 (contrasting build-out requirements with "PEG and I-Net support"). The legislative history cited by NATOA, NATOA Ex Parte at 6, n. 20, does not support the proposition that Congress viewed the provision of *PEG* capacity as essential. The cited language simply provides an overview of franchising authority's role over services and facilities under the Cable Act, and characterizes

NATOA further claims that the *Draft Order*'s mixed-use rule supposedly "tips the regulatory scale in favor of cable operators."[51] It argues that the *Draft Order* misreads the legislative history of the 1996 amendments to the Cable Act in concluding that localities cannot charge redundant or duplicative fees on cable franchisees and that fees above the statutory five-percent cap are not "fair and reasonable."[52] But the *Draft Order* specifically addresses NATOA's point—which NATOA raised in a prior filing—and found "unpersuasive NATOA et al.'s selective reading of the legislative history."[53] NATOA's belated ex parte does nothing to undermine the *Draft Order*'s conclusion, which is well reasoned and supported in the record.[54]

NATOA repeats its view—"discussed in [its] prior filings in this docket"—that the *Draft Order*'s mixed-use rule allegedly "creates an unlevel playing field and gives cable operators a competitive advantage in providing non-cable services."[55] But, as the *Draft Order* explains, the mixed-use rule does no such thing. It merely honors congressional intent by preserving the "then-existing *status quo* concerning regulatory jurisdiction over cable operators' non-cable services, facilities, and equipment."[56] NATOA also ignores the fact, discussed above, that the *Draft Order* preserves the rights-of-way management authority of state and local governments provided they are exercised in a manner consistent with Title VI and the Communications Act.[57] NATOA's rehashed argument is just as incorrect now as it was before.

NATOA and the City of Eugene both argue that the *Draft Order*'s broad preemption under Section 636 of franchising authority regulation grounded in authority other than Title VI is procedurally defective because it was inadequately noticed in, and is not a logical outgrowth of, the *Second FNPRM*.[58] But the *Second FNPRM* clearly evinced the Commission's intent to

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that role as "essential," not any particular facilities. H.R. Rep. No. 98-934, at 26 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655. The Committee's discussion of PEG follows in a subsequent section. *See id.* at 30, *as reprinted in* 1984 U.S.C.C.A.N. at 4667.

[51] NATOA Ex Parte at 8-10.

[52] *Id.* at 8-9.

[53] *Draft Order* ¶ 96 & n.342 (citing NATOA Mar. 15, 2019 Ex Parte at 2).

[54] NATOA reiterates its erroneous view that 47 U.S.C. § 253(c) authorizes duplicative ROW fees. *See* NATOA Ex Parte at 9 & n.35. As NCTA has previously explained, "Section 253 is not an additional source of authority for regulation of already-franchised cable systems that also provide telecommunications services." NCTA Reply Comments at 24 n.78. Rather, "Section 253's directive that compensation for use of public rights-of-way must be 'fair and reasonable' and 'competitively neutral and nondiscriminatory' bars franchising authorities from requiring further compensation for the provision of broadband, VoIP, telecommunications, or other services over cable system facilities from cable operators who already pay more than full compensation for their use of the public rights-of-way via cable franchise fees." *Id.* (citing NCTA Comments at 21-26).

[55] NATOA Ex Parte at 9 (citing NATOA Reply Comments at 11-17).

[56] *Draft Order* ¶ 67; *see also id.* ¶ 73.

[57] *Id.* ¶¶ 106-107.

[58] NATOA Ex Parte at 10; City of Eugene Ex Parte at 2-3.

exercise its preemptive authority with respect to state and local regulations of cable operators that conflict with the limitations in Title VI.[59] As the *Draft Order* explains, such preemption is necessary because "[a]mple record evidence shows . . . that some states and localities are purporting to assert authority" to "extract fees or impose franchise or other requirements on cable operators" that exceed "the limited scope of their authority under Title VI."[60] As the *Draft Order* also explains, such preemption here is consistent with both Commission precedent and, more importantly, the Commission's authority to "identify the scope" of Section 636(c), the Cable Act's express preemption provision.[61]

The *Draft Order*'s broad preemption in response to record evidence of the need for such action is clearly a logical outgrowth of the *Second FNPRM*. Indeed, given their own express advocacy on this question, NATOA and the City of Eugene "should have anticipated"—and in fact did anticipate—that Section 636 might be applied broadly and "filed their" primary "comments on the subject during the notice-and-comment period."[62] The City of Eugene's substantive objections to the preemption in the *Draft Order* are likewise fully addressed by the *Draft Order* and should be dismissed.[63]

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[59] *See, e.g.*, *Second FNPRM* ¶ 29 (stating that any LFA regulation of information services would be inconsistent with federal policy and classification of broadband as "information service"). The *Second FNPRM* also cites the *RIF Order*, which broadly preempts state and local regulation of broadband services (and equipment and facilities used to provide it) irrespective of whether those regulations are grounded in Title VI or inherent authority. *See id*.

[60] *Draft Order* ¶ 82.

[61] *Id.* ¶¶ 82-83 (describing precedent and authority supporting preemption); *see also id.* ¶¶ 84-110 (describing basis for broad preemption here, including of additional fees and franchise and other requirements). NATOA and the City of Eugene both argue that the *Second FNPRM* cites Section 636 only once. But they fail to mention that the *Second FNPRM* cites Section 636 for the exact proposition relied on in the *Draft Order—viz.*, that any action by a state or local franchising authority "which is inconsistent with this [Act] shall be deemed to be preempted and superseded." *Second FNPRM* ¶ 27 n.126 (brackets in original). Their arguments are further undercut by the fact that, as the City of Eugene admits, the Commission has relied on this exact provision in prior proceedings in the same docket to effectuate preemption, *see* City of Eugene Ex Parte at 2 (citing and analyzing use of Section 636 in *First 621 Order*), and that courts have likewise made clear that Section 636 gives *mandatory* preemptive effect to the substantive limitations in Title VI, *see, e.g.*, *Liberty Cablevision of Puerto Rico, Inc. v. Municipality of Caguas*, 417 F.3d 216, 221 (1st Cir. 2005).

[62] *See Agape Church, Inc. v. F.C.C.*, 738 F.3d 387, 422 (D.C. Cir. 2013); *see also Nat'l Mining Ass'n v. Mine Safety & Health Admin*, 512 F.3d 696, 699-700 (D.C. Cir. 2008) (citing cases that considered the "comments, statements and proposals made during the notice-and-comment period" in evaluating whether a rule was the "logical outgrowth"); *Sprint Corp. v. FCC*, 315 F.3d 369, 376 (D.C. Cir. 2003) ("The necessary predicate [for satisfying the logical outgrowth test] . . . is that the agency . . . alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed." (internal quotation marks omitted)).

[63] *See also* NCTA March 13 Ex Parte at 10-11 ("there is ample case law supporting the principle that a local government cannot end-run the protections of Title VI by relying on some other non-franchising source of authority"); NCTA Comments at 18-20 (discussing and citing cases supporting same).

LFA Studies/ NATOA Meetings Ex Parte. A group of LFAs separately submitted three financial analyses from 2013-2015 to contend that cable operators "have the resources available" to absorb excessive franchise fees, regardless of the law.[64] They also submitted a 2011 "Engineering Analysis of Public Rights-of-Way Processes" that does not discuss cable franchise fees or in-kind compensation.[65] These dated studies are irrelevant to the legal issues in this proceeding. Neither the historic economic condition of the cable industry nor local permitting processes are the subject of this proceeding. Nor do these stale studies bear on the underlying economic reality that excessive franchise fees necessarily discourage business activity and investment, including broadband deployment, as fully—and timely—demonstrated in the record.[66]

NATOA similarly submitted a lengthy ex parte that purports to respond to various ex partes filed by NCTA as far back as mid-March 2019. These late-filed arguments are also fully addressed in the record, to the extent that they are not entirely mooted by the *Draft Order*.[67]

This letter is being filed electronically pursuant to Section 1.1206 of the Commission's rules. Please direct any questions to the undersigned.

Respectfully submitted,

/s/ Rick Chessen

Rick Chessen

CC: Michelle Carey

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[64] *See generally* Letter from Gerard Lavery Lederer, Best Best & Krieger, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 05-311 (July 24, 2019) ("LFA Studies"). Each of these three documents is a "Spotlight on profitable growth" for the Media & Entertainment industry bearing the Ernst & Young logo, for the years 2013, 2014 and 2015, with the cable industry considered broadly as one of several industry sectors.

[65] The National League of Cities and other LFA interests filed this report with their comments in WC Docket No. 11-59, *In the Matter of Acceleration of Broadband Deployment Expanding the Reach and Reducing the Cost of Broadband Deployment by Improving Policies Regarding Public Rights of Way and Wireless Facilities Siting* on July 18, 2011.

[66] *See supra* note 8.

[67] Besides being irrelevant, the filing of these stale comments on the eve of the sunshine period seem designed to minimize the ability of the Commission and other stakeholders to respond. *See Verizon & AT&T, Inc. v. FCC,* 770 F.3d 961, 968 (D.C. Cir. 2014) (upholding the Commission's decision to decline to consider a proposal in an ex parte filed "so late . . . it had insufficient time to evaluate it" and stating that "the FCC is not obliged to consider late-filed proposals").